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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-156

UNITED STATES *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Petitioners,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. McGRATH, Commissioner of Correction of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NEW YORK PRESBYTERY TASK FORCE FOR JUSTICE AS *AMICUS CURIAE*

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INDEX

PAGE

Interest of the Amicus Curiae 1

ARGUMENT 3

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Coleman v. *Alabama*, 389 U.S. 22 (1967) 7

Hernandez v. *Texas*, 347 U.S. 475 (1954) 3, 4, 5, 7, 9
Hoyt v. *Florida*, 368 U.S. 57 (1961) 4

King v. *United States*, 346 F.2d 123 (1st Cir. 1965) 5

Neal v. *Delaware*, 103 U.S. 370 (1881) 7, 9
Norris v. *Alabama*, 294 U.S. 587 (1935) 4, 7

Smith v. *Texas*, 311 U.S. 128 (1940) 1
Strauder v. *West Virginia*, 100 U.S. 303 (1880) 1, 3, 9

Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946) 8

United States v. *Di Tommaso*, 405 F.2d 385 (4th Cir. 1968) 5

PAGE

Constitutional and Statutory Provisions:

Constitution of the United States
- Article I, Section 2 7
- Article I, Section 3 8
- Article II, Section 1 8
- Amendment XIV 3

New York Judiciary Law §596 ..... 6, 8

Miscellaneous:

Rule 201, Proposed Rules of Evidence for the United States Courts and Magistrates (1970) 5

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Interest of the *Amicus Curiae*

This case presents the spectacle of a grand jury so selected as to mock all ingenuous descriptions of that institution as a representative body.[1] Systematically and

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[1] The jury has been characterized as "a body truly representative of the community." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). It must be composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880).

deliberately excluded from the ranks of the Second August, 1964 New York County Grand Jury were all adults between the ages of 21 and 35, and the poor (including, but not limited to, welfare recipients). Moreover, Blacks and Puerto Ricans, who together made up 33% of the adult population of New York County in 1960, comprised only 1.68% of the grand jury list from which the Second August, 1964 Grand Jury was drawn.

Petitioners, all of whom were poor and under 35 (one was also Black), were entitled to a grand jury of "representative citizens," a true cross section of the heterogeneous citizenry residing in New York County. In its place, petitioners were confronted with an undemocratic body from which the young, the poor and certain ethnic minorities had been purposefully excluded.

The New York Presbytery Task Force For Justice joins with petitioners herein to vindicate the Constitutional principle that nothing less than a jury selection system which draws impartially from the entire community can provide equality before the bar of justice. Such equality is the keystone of the Constitutional guarantees of due process and equal protection and when that keystone has been undermined, no citizen or group of citizens can long remain silent.

The Task Force For Justice joins in the full range of petitioners' objections to the Second August, 1964 Grand Jury, but will focus herein on the systematic exclusion of adults between the ages of 21 and 35.

ARGUMENT

Petitioners, all of whom were under 35, were members of a class which was intentionally, systematically and unjustifiably excluded from the Second August, 1964 Grand Jury in violation of the Fourteenth Amendment.

This case comes to the Supreme Court ripe for reversal because of the clear conflict between the decisions below and the doctrine of this Court, emanating from *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), that systematic exclusion of classes of citizens from jury duty is repugnant to the equal protection guarantees of the Fourteenth Amendment.

That doctrine was given prescient expression, considering the facts in the case at bar, in *Hernandez* v. *Texas,* 347 U.S. 475 (1954). *Hernandez* established that those classes of persons entitled to protection by the Court from systematic exclusion must not be defined exclusively by race, color or common ancestry:

> ". . . Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. *But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for dif-*

ferent treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." Hernandez, supra at 478. (Emphasis added.) See also: *Hoyt* v. *Florida,* 368 U.S. 57, 60-61 (1961) (women exempted, but not systematically excluded, from jury duty).

Once the existence of the class is established, and it is shown that the class is systematically excluded, denial of equal protection to the members of the class has been prima facie demonstrated. It is then the respondents' burden to demonstrate, by way of rebuttal, the reasonableness of the classification resulting in discrimination. *Id.* Under *Hernandez,* the petitioners herein were clearly denied their measure of justice since, by systematically excluding from grand jury service the entire class of otherwise eligible persons under 35 years of age, respondents invidiously discriminated against them as members of that class.

Assuming for the moment that those otherwise eligible but under 35 do constitute a definable class consistent with *Hernandez,* there can be no doubt that *all* such potential grand jurors falling within the class were intentionally and systematically excluded from grand jury service at the time petitioners were prosecuted on presentment of the Second August, 1964 Grand Jury and convicted of contempt.[2]

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[2] It would be redundant to recite statistical proof which demonstrates exclusion in this case after the fashion of *Norris* v. *Alabama,* 294 U.S. 587 (1935) and cases following it, since exclusion of those aged 21 to 35 was found *as a fact* by the courts below (Petition for a Writ of Certiorari, Appendix A, p. 3a; Appendix B, p. 18a; Appendix F, p. 36a, 41a). Nor, for the same reason, may the practice be excused as *de minimis* or nondeliberate, as

Turning next to the threshold issue of *Hernandez*, young adults between the ages of 21 and 35 clearly constitute a definable class worthy of judicial protection from discrimination in jury selection. The petitioners introduced substantial, unrebutted evidence below to demonstrate what all the world knows—*i.e.* that there is a readily observable and definable class of individuals between 21 and 35, with differing life styles, attitudes, political and historical perspectives from those making up their parents' generation.[3]

The courts below have concluded that petitioners were not deprived of "the insights, perspectives or prejudices of any identifiable class or group such as 'young adults' . . . " (*i.e.* those *under* 35). Yet those very courts, as well as respondents herein, repeatedly attributed certain characteristics to a "class" comprised of those *over* 35 *e.g.*, "greater experience" and more exposure to "life's vicissitudes") (Petition For A Writ Of Certiorari, Appendix A, p. 13a; Appendix F, p. 41a). It must logically follow that there exists a reciprocal group or "class" of adults *under* 35 who, by definition, are differentiated by a lack of certain "experiences" and exposure to "life's vicissitudes."

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in *King* v. *United States*, 346 F.2d 123, 125 (1st Cir. 1965), or as a random consequence of an otherwise acceptable jury selection system, as in *United States* v. *Di Tommaso*, 405 F.2d 385 (4th Cir. 1968).

[3] Indeed, this Court may take judicial notice, as Mr. Justice Murtagh did below (II. 447, 448, 450), of the fact that adults between 21 and 35 comprise a class of persons different from other age groups. Rule 201, *Proposed Rules of Evidence For The United States Courts and Magistrates* (1970).

Indeed, what more compelling proof that the instant group constitutes a class desperately in need of this Court's protection could be asserted than the fact that those responsible for the initial selection of grand jurors summarily relegated this entire group to the ranks of the immature, allegedly unfit to sit in judgment of their fellow citizens. Such action was taken despite the legislative mandate declaring *all* those over 21, otherwise qualified, eligible to serve.

The citizens of New York, acting through their elected representatives, have determined that a grand (and petit) juror need only:

> "1. Be a citizen of the United States and a resident of the county.
>
> "2. *Be not less than twenty-one,* nor more than seventy-five years of age, provided however, that a person between seventy and seventy-five years of age shall be excused at the request of any party to the action and such request shall not constitute a peremptory challenge.
>
> "3. *Be in the possession of his natural faculties* and not infirm or decrepit.
>
> "4. *Not have been convicted of a felony or a misdemeanor involving moral turpitude.*
>
> "5. *Be intelligent; of sound mind and good character; well informed;* able to read and write the English language understandingly. . . ." N.Y. Judiciary Law, §596. (Emphasis added.)

How, then, did the County Clerk administer this statute? By literally and intentionally programming the computer

to exclude all persons under 35. The Clerk not only recognized the class; he arrogated to himself the authority to summarily exclude all members thereof (Petition For A Writ Of Certiorari, Appendix F, p. 41a).

Since petitioners have demonstrated that an identifiable class has been systematically excluded, the burden falls on respondents to rebut, if possible, "the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established." *Hernandez, supra* at 481. See also: *Coleman* v. *Alabama,* 389 U.S. 22, 23 (1967). Yet the respondents in the case at bar have not truly attempted to meet this burden; they have offered nothing save a testament to the very discrimination complained of by their assertion that those under 35 lack the requisite "experience" (Petition For A Writ Of Certiorari, Appendix F, p. 41a).[4]

There is no statutory requirement that a grand juror be "experienced" or have suffered exposure to "life's vicissitudes." Nor is there any suggestion that "experience" may be an acceptable substitute for intelligence, good character or freedom from infirmity. In short, intelligence and sound judgment are not necessarily a function of chronological age and, even if they were, the New York Legislature has determined, as noted above, that those over 21, who are otherwise found fit, are eligible for grand jury service.[5] Respondents have not attempted

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[4] General assertions that administrators merely thought they were doing their duty, and choosing those best qualified, is inadequate. *Hernandez, supra* at 481; *Norris, supra* at 598. Indeed, discrimination on the basis of general, presumed, class attributes, such as the want of experience, are the very *crux* of systematic exclusion. See: *Neal* v. *Delaware,* 103 U.S. 370, 394 (1881).

[5] We note in passing that the Constitution of the United States requires a Representative to be at least 25 (Art. I, Sec. 2), a

to show that *all* persons between the ages of 21 and 35 lack the statutory qualifications to serve as grand jurors. Indeed, such a task would be impossible since, without any pertinent amendment of the statute, the systematic exclusion of potential grand jurors under 35 years of age has been terminated (Petition For A Writ Of Certiorari, Appendix A, p. 5a, n. 3). Nor have the courts below accepted the respondents' unstated premise that "maturity" (*i.e.*, sufficient intelligence, good character and freedom from infirmity to pass judgment upon other members of the community) is an unattainable goal for all those between 21 and 35. Yet the purposeful and systematic exclusion of all members of that age group presupposes that indefensible premise.

Petitioners do not—indeed, would not—attack the subjective tests of qualification for service implicit in New York Judiciary Law §596, *supra*. Here, however, no such tests were ever applied. New York County, by summarily excluding the entire class, has proceeded as if not one member of that class was competent to serve. *Yet the record discloses not one interview of a member of the class during the relevant period.*[6] "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system." *Thiel* v. *South-*

Senator to be at least 30 (Art. I, Sec. 3) and the President to be at least 35 (Art. II, Sec. 1). While we do not question the relative importance of the grand jury, we doubt that service on that body calls for the same level of "experience" and exposure to "life's vicissitudes" as is required for service as President of the United States.

[6] Potential jurors not arbitrarily excluded, *i.e.* those 35 and over, filled out questionnaires and were interviewed by the Clerk, who passed on their qualifications (Petition for a Writ of Certiorari, Appendix A, p. 4a, n. 2).

ern Pacific Co., 328 U.S. 217, 220 (1946). Not one member of the 21 to 35 age group was considered for grand jury service on his individual merits.

Glib generalities concerning presumed class characteristics inevitably work injustice to individuals and are inherently repugnant. This concept is hardly unfamiliar to the Court:

> "It was, we think, under all the circumstances, a *violent presumption* which the State court indulged, that such uniform exclusion of . . . [Blacks] . . . from juries, during a period of many years, was solely because in the judgment of . . . [State officials] . . ., fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries." *Neal, supra* at 392. (Emphasis added.)

And, as with racial classes, so also with classes of common ancestry:

> ". . . [I]t taxes our credulity to say that mere chance resulted in there being no members of this class [persons of Mexican descent] among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez, supra* at 482.

Just as equal access to potential jury service is Constitutionally mandated for Blacks, Mexicans, and "all naturalized Celtic Irishman,"[7] so is it Constitutionally mandated for young adults.

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[7] *Strauder, supra* at 308.

If it be supposed, as it must, that a grand jury should be selected from and truly represent a cross section of the community with its broad spectrum of social, economic, political, religious and cultural variations, then the deliberate and systematic exclusion of one identifiable component of that spectrum (*i.e.*, young adults) renders the grand jury selection process Constitutionally invalid. How can a jury so selected fulfill its historic democratic function without the benefit of intelligent young adults of sound mind and good character among its members?

The Second August, 1964 Grand Jury, bereft as it was of the attitudes and judgments of those between the ages of 21 and 35, could not sit in impartial judgment of petitioners, all of whom were under the age of 35.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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